NO. 48051-4-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

DONALD W. AND BESSIE L. GREELEY

Respondents

v.

FRANK MINNICK

Appellant

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes and Other Authorities

Court Rules

I. ARGUMENT IN REPLY

A. THE COURT HAS JURISDICTION TO HEAR THIS APPEAL.

1. The Parties did not stipulate that the appeals would be "controlled by the Rules of Appeal from Courts of Limited Jurisdiction".

Respondents argue that this matter is not properly before the Court of Appeals because the parties stipulated that Appeals were "controlled by" the **Rules of Appeal of Limited Jurisdiction ("RALJ")**. This is an inaccurate representation of the stipulation. This matter was a Superior Court matter and a dispute involving real property. This matter was not a "review of a decision of a court of limited jurisdiction" and therefore **RAP 2.2**(c) does not apply. This is an appeal of a final judgment and order of a Superior Court matter, and is appealable under **RAP 2.2(a)(1).**

The undersigned and Respondents' trial court counsel prepared the stipulation for arbitration, and it was neither the intent, nor the result that this matter be 'converted' to a District Court matter. The only intent of the stipulation with respect to the Rules of Limited Jurisdiction was to provide a *procedure* for a *hearing* on an appeal to Superior Court from the Arbitrator's decision (which was heard and decided according to the

Mandatory Arbitration Rules of Superior Court. CP 14-16. Respondents' appellate counsel presents the language of the stipulation and order out of context, as he fails to provide the entire paragraph on the subject so that the court can properly interpret the order. The paragraph dealing with the arbitration and appeals from it states as follows:

> *"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that CHRIS KEAY shall be appointed to arbitrate all claims under the above cause,* ***pursuant to The State and Local Superior Court Rules for Mandatory Arbitration.*** *The decision of the arbitrator shall be final and binding as to any facts determined, but shall be appealable to the Superior Court only as to errors as a matter of law (record review in the same procedure as appeals from Courts of Limited Jurisdiction)".*
>
> CP 15-16. (Emphasis added).

As this court can see, the language in the order provided for a 'hybrid' arbitration and appeal process in one paragraph, whereby the matter would be arbitrated under the Mandatory Arbitration Rules, but that rather than allowing for a fact finding trial de novo as an appeal, the procedure for the ***hearing*** before the Superior Court on appeal would be limited to errors as a matter of law, and would be a record review (like that of an appeal from a Court of Limited Jurisdiction). Accordingly the only reference to Courts of Limited Jurisdiction was the procedure for the Superior Court appeal hearing, and nothing more. Nothing in the stipulated order converted the entire matter to a 'Court of Limited

Jurisdiction matter', or provided that all issues or further appeals in the case would be governed by the Courts of Limited Jurisdiction rules.

Furthermore, if (as Respondents argue), this matter is governed by Rules for Appeal of Decisions of Courts of Limited Jurisdiction ("RALJ"), then there was no recording, or proper "record" for the Superior Court to review, nor did the parties stipulate regarding the same. **RALJ 6.1(a)**. The Respondents were Plaintiffs in this matter. Respondents did not arrange for a court reporter at the arbitration and accordingly the "record" as it was, was limited to the pleadings and the exhibits presented at hearing. Accordingly, if it is Respondents' position that the entire appeal was governed by the **RALJ**, then this matter should be reversed and remanded back to the trial court, and the decision of the arbitrator should be vacated, as there was not a recording or log of the same, or complete record before the trial court for the initial appeal, as is required by the plain language of **RALJ 6.1(a)**. Furthermore the parties did not stipulate to a form of record, nor did a Court of Limited Jurisdiction approve an alternate record, as would have been allowable under **RALJ 6.1(b)**.

If this court determines that this matter was somehow 'converted' to a "Decision of a Court of Limited Jurisdiction" for appeal purposes going forward, on that basis alone, the trial court's Judgment and Order in

this case should be vacated, and the matter should be remanded back to the trial court for a new case schedule with a trial date.

B. THIS MATTER WAS ARBITRATED PURSUANT TO THE MANDATORY ARBITRATION RULES FOR SUPERIOR COURT, AND REVIEW SHOULD NOT BE LIMITED TO APPEALS UNDER RCW 7.04A (but this matter may need to be remanded back to Superior Court for a trial de novo).

Respondents argue that this court should limit its review to matters permitted under **RCW 7.04A**. However, as is referenced in the above cited Stipulation, this matter was clearly arbitrated under the **Mandatory Arbitration Rules for Superior Court** ("**MAR**"), and was not binding arbitration under **RCW 7.04A**. Therefore, the court's analysis should focus on the rules appeals of arbitrations conducted under **MAR**, in conjunction with the parties' stipulation, to the extent that the court finds it enforceable. Respondents' multi-page analysis of review of *binding* arbitration cases and statutes under **RCW 7.04A** are simply inapplicable here.

Moreover, Respondents go on to cite a number of cases which stand for the proposition that the parties cannot by agreement, extend or limit the court's jurisdiction regarding arbitration of matters. Interestingly, Respondents cite Schneider v. Setzer, 74 Wash. App. 373,

380, 872 P.2d 1158, 1161-62 (1994)[1], which held that parties may not stipulate to waive trial de novo or modify the process by which a court may review an arbitration governed under the **MAR**. In that case, the court held that:

> *"The stipulation between the Schneiders and Setzer is an attempt to circumvent the normal court process in order to obtain prompter review in the appellate court. Such manipulation of the mandatory arbitration procedure is unfair to other litigants who proceed with the regular court process....*
>
> *...RCW 7.06.050 provides that the decision of the arbitrator in a mandatory arbitration is subject to a trial de novo in superior court. Bypassing the superior court by waiving the right to trial de novo in order to gain immediate review in the court of appeals is inconsistent with this statute. While the findings and conclusions entered by the arbitrator in this case would make such review theoretically possible, the statutory scheme does not contemplate circumvention of the superior court in such a manner".*
>
> Id. at 379.

The Supreme Court specifically held in Barnett v. Hicks that the nature and scope of review of the arbitrator's decision cannot be stipulated to by the parties. Barnett v. Hicks at 163. Therefore, the parties are confined to that review provided by the appropriate statutes.

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[1] Schneider citing *Barnett v. Hicks,* 119 Wash.2d 151, 161, 829 P.2d 1087 (1992) (litigants can neither stipulate to jurisdiction nor create their own boundaries of review). The wisdom of this rule is evident from the posture in which this case is presented to the appellate court.

The parties proposed a stipulation for mediation and arbitration which limited the manner and extent of review of the Superior Court on October 14, 2013, and the court approved it and signed it on that day (rather than rejecting it as void at the time). (CP 13-18). The arbitrator in the instant case filed an award on 2/18/2015 which was timely appealed by Appellant Minnick on 2/24/2015, pursuant to the aforementioned court order. CP 19-32. Rather than declining to hear the matter in the manner provided for in the parties' stipulation, and setting the matter for a trial de novo, the trial court heard the matter, confirming the arbitrator's award after a motion hearing based solely on errors as a matter of law. CP 192-194; CP 187-191.

The undersigned acknowledges that he was unaware of that decision prior to its citation by Respondents. The facts in Schneider *are* strikingly similar to the facts in the instant case in that the parties attempted to modify the appeal procedure, limiting appellate review to errors as a matter of law (rather than permitting the standard trial de novo). While the facts in Schneider differ from the instant case in that the parties in that case stipulated to direct review of the arbitration award to the Court of Appeals, the fundamental premise of Schneider appears identical in that the court held that the parties cannot eliminate or modify the process of appeals of **MAR** arbitrations. Schneider at 380. The Schneider court

appears to hold that parties may not engage under **MAR**, but then waive a trial de novo. To the extent that this court determines that Schneider is applicable to the facts in this case, this court should remand this matter back to the trial court for a trial de novo.

If Schneider prohibits stipulations like the one in this case, the parties erred in entering into such a stipulation, and the trial court erred by recognizing it. Under this scenario, this court should remand back to the trial court for a trial setting of a trial de novo.

C. THE ARBITRATOR'S AWARD, AND CONFIRMING JUDGMENT AND ORDER DO CONTAIN ERRORS AS A MATTER OF LAW.

In their substantive response to this appeal, Respondents continue their analysis of Appellant's appeal through the prism of **RCW 7.04A.230**, despite the fact that this matter was actually arbitrated under **MAR**, as authorized by **RCW 7.06.050**. Again, recognizing the difficulty caused by the stipulation as outlined in Schneider v. Setzer above, the analysis of review of this matter is not properly addressed through the spectrum of **RCW 7.04A**. Notwithstanding the procedural problems that the stipulation has admittedly triggered, the intent of the parties in permitting review (rather than stipulating to binding arbitration), was to allow the court system to confirm that the law was properly applied to the

facts as determined by the arbitrator (not to limit review under **RCW 7.04A**). Accordingly, the Appellant has approached both the trial court appeal, as well as this appeal, based on that premise, and until retaining new appellate legal counsel, so have the Respondents.

1. The facts were not genuinely disputed, but because there was no record of the arbitration proceedings, the parties and trial court were limited to pleadings and exhibits presented on appeal.

As has been referenced by both parties in this case, there was no recorded proceeding at arbitration, so it is difficult to ascertain what testimonial evidence was presented or accepted by the arbitrator. Accordingly, the parties and the trial court judge were limited to review and argument from the pleadings and the exhibits which were submitted before the court. However, Appellant disagrees that the facts were really disputed. Rather, it was the application of the facts to the law which was problematic.

Respondents now attempt to eliminate their admissions of facts in briefing in this case, including its position in its Prehearing Statement of Proof. Respondents' brief pages 11-12. The Appellant submitted Respondents' pre-hearing statement of proof and the court considered it in oral argument, without any objection by Respondents, let alone an

exclusion of the document from consideration. Respondents' objection to reference to this document is untimely.

Second, Respondents seems to be arguing that the testimony they presented at the hearing conflicts with their own pre-hearing statement, submitted in support of their position at arbitration. This not only sheds some light on Respondents' credibility in reporting the facts in this case, it defies logic, as Respondents essentially argue the exact same facts in their *trial court* appeal brief, as are contained in their pre-hearing statement of proof. (Compare CP 105-110 to CP 96-101).

Finally, when a pleading or affidavit is properly made and is uncontradicted, it may be taken as true for purposes of passing upon the motions such as what was before the trial court (court allowing pleadings to be considered as verities on Summary Judgment). Leland v. Frogge, 71 Wash. 2d 197, 200, 427 P.2d 724, 727 (1967).

Respondents seem to assign error to Appellant for not having a record on review, when at a minimum; Respondents are equally at fault in that regard. Furthermore, Appellant submits that as Plaintiffs, Respondents, as the party Plaintiff should have ensured that there was a recorded proceeding at arbitration, considering the parties' stipulation that

review would be based solely on errors of law using facts established at the arbitration.

Respondents cite Kaye v. Lowe's HIW, Inc., 158 Wash. App. 320, 332, 242 P.3d 27, 33 (2010) to support their contention that a record must be provided to challenge the sufficiency of evidence. In Kaye, the appellant apparently did not provide exhibits are part of his record on review. The instant case is clearly different, as Appellant did provide the exhibits to the Court of Appeals in its designation of clerk's papers, but there was no recorded record to provide in this case, as one did not exist. As illustrated in this section, the responsibility for that issue, at a minimum, falls on both parties.

2. Arbitrator's misinterpretation of **RCW 7.28.070** is reflected in the award and caused a misapplication of facts to the law.

Respondents argue that the arbitrator did not error as a matter of law on the face of the award as his ruling assessed **RCW 7.28.070**. For the reasons argued in Appellant's opening materials, Appellant disagrees with this position. Furthermore, by indicating that the arbitrator did not believe hostility and exclusivity were required to be proven, it demonstrates that his weight given to those elements was affected.

Furthermore, without citing any legal authority for the same, the arbitrator indicates in Paragraph 19 of his award that because the property was subject to an easement (which would "affect the expected use of an owner"), Respondents use could somehow "ripen into adverse possession". (CP 25). This statement makes absolutely no sense and cites no established authority to support it. Furthermore, as Appellant has previously argued, the fact that the property is subject to an easement which allows Respondents, as the owner of the easement over the disputed land to use the land (and also requires Respondents to maintain the easement), makes Respondents showing of "adverse possession" that much more difficult, not easier.

3. Respondents cannot identify one fact that was established that demonstrates that they, as dominant easement holders, treated the property as an owner would, as opposed to as a person holding an easement would.

Respondents continue to speak in generalities with regard to how they "adversely" used the property, but fail to identify one single established fact that supports their claim. They cite Littlefair v. Schulze, 169 Wash. App. 659, 278 P.3d 218, 221 (2012), as amended on denial of reconsideration (Sept. 25, 2012), to support their position that a having an

easement does not preclude a claim for adverse possession. However, they provide no analysis as to how the facts in that case apply to the instant case. In fact, in Littlefair, it was the *servient* owner of an easement attempted *to fence off* an easement from the *dominant* owner of the easement. Id. at 662. In that case, the court found that a *servient* estate owner may use his property in any reasonable manner that does not interfere with the original purpose of the easement. Id. at 665. Even under those facts the court remarked that a servient estate owner may [even] have difficulty proving an adverse possession claim because most uses are not hostile. Id. at 665-66.

Those facts are completely the opposite of the facts in the instant case, and Appellant submits that it is even more difficult for the *dominant* owner of an easement to adversely possess an easement on vacant land, where he has a right to use the land, and a duty to maintain it. Crystal Ridge Homeowners Ass'n v. City of Bothell, 182 Wash. 2d 665, 672, 343 P.3d 746, 750 (2015). Here, Respondents are the *dominant* owner of the easement and other than presenting evidence that they mowed the area and occasionally cleared debris, there was no other evidence of their use of the property presented whatsoever. (CP 107-108). In other words, Respondents argue that by acting like a dominant owner of an easement,

yet providing absolutely no evidence of use which would be indicative of something different than a dominant owner of an easement, they have established a claim of Adverse Possession. Even to the extent that they allegedly complained that Mr. Minnick would store personal property on the easement, such conduct is consistent with a dominant easement holder demanding that the easement remain clear. (CP 97,98).

The burden of proof to prove adverse possession, under color of title or otherwise, clearly lies with the Plaintiffs (Respondents)[2], and they did not even come close to meeting that burden.

II. CONCLUSION

For the above reasons, this court should:

(1) Reverse the trial court's order upholding the arbitrator's award finding that Respondents had established ownership of the disputed property by adverse possession; or

(2) Remand the matter back to the trial court for a trial de novo.

Respectfully submitted this 8th day of February, 2016.

MARK E. BARDWIL, WSBA #24776
Attorney for Appellant Frank Minnick

[2] Turner v. Davisson, 47 Wash. 2d 375, 384-85, 287 P.2d 726, 732 (1955).

Certificate of Service

On February 8, 2016, the undersigned caused to be sent by first class mail, postage prepaid in the mails of the United States at Tacoma, Washington, and by email, a copy of the Reply Brief of Appellant to the following:

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I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Signed at Tacoma, Washington, this 8th day of February 2016.

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